Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

ANGELA R. SPELL,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ERNEST L. LEWIS; DONAL A. WALSH; D. ROBERTO PAEZ, AND GEORGE A. KAYSEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Petitioner Angela Spell's claims for racial, gender, and disability discrimination in connection with her dismissal from the University of California at Davis Medical School were dismissed on summary judgment after the following events occurred: (1) Her attorney took no discovery; (2) The district court denied Petitioner's request, to which defendants even stipulated, for an extension of the discovery deadline; (3) The court also denied her request to remove the attorney from the case; (4) The attorney then failed to timely oppose defendants' motion for summary judgment; (5) The court then belatedly removed the attorney and permitted Petitioner to oppose *pro se* the summary judgment motion after continuing the hearing date; (6) But Petitioner, who lacked legal training, was unable to properly authenticate the substantial evidence she had of disputed material facts that would preclude summary judgment.

The district court implicitly, and the Ninth Circuit Court of Appeals explicitly, held that any attorney error, no matter how egregious, is an insufficient ground for relief from summary judgment under FRCP Rule 60(b)(1) and (6).

The question presented is whether the district court and the Ninth Circuit erred in holding that attorney error, as a matter of law, is *per se* an insufficient ground for relief from summary judgment under FRCP Rule 60(b)(1) and (6).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Spell ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Hon. Garland E. Burrell, Jr.) granting respondents' motion for summary judgment (Appendix ("Pet.App." C-1 to C-20)), is an unpublished opinion. Also unpublished are the district court's subsequent opinions denying Petitioner's two motions for reconsideration under Rules 59 and 60 (Pet.App. B-1 to B-4), the court of appeals' opinion (per Hon. Judges Wallace, Beezer and Fernandez) affirming the district court's order denying Petitioner's motion for reconsideration (Pet.App. A-1 to A-2), and the court of appeals' opinion denying Petitioner's petition for a hearing en banc (Pet.App. H-1).

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion and order on September 25, 2000, and denied rehearing en banc on February 27, 2001. Justice O'Connor subsequently extended time to file this petition for writ of certiorari to and including June 27, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 60(b) is relevant to this petition.

STATEMENT OF THE CASE

Petitioner is an African-American woman who attended the University of California at Davis Medical School ("University"). Respondent The Regents of the University of California ("Regents") is a State of California public entity that operates the University. Respondents Ernest L. Lewis, Donal A. Walsh, D. Roberto Paez, and George A. Kaysen are administrators and/or faculty members of Regents and the University.

Petitioner's claims are based on racially discriminatory disparate treatment, disparate impact, and retaliation, in violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d); on violations of the rights to equal protection and due process of law under the Fourteenth Amendment and to freedom of speech under the First Amendment to the U.S. Constitution, as protected by 42 U.S.C. § 1983; on violation of the Americans With Disabilities Act (42 U.S.C. § 12101) (failure to provide reasonable accommodation for a learning disability); on Title IX gender discrimination (20 U.S.C. § 1681); and on the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). Petitioner sought damages as well as preliminary and permanent injunctive relief against respondents regarding the expungement of substandard grades she received as a result of respondents' violations of the aforementioned laws.

Because of the gross neglect of her case perpetrated by Petitioner's attorney Miles Washington, Petitioner was unable to file any legally effective opposition to respondents' motion for summary judgment, which the district court granted.

Washington began by failing to conduct any discovery or attend critical depositions in the case. On September 18, 1998, twelve days before the close of discovery (September 30), he informed Petitioner that he intended to withdraw as counsel, and that he would secure an extension of time regarding discovery cut-off dates *only* if Petitioner stipulated to his withdrawal. Under that duress from her attorney, Petitioner did so stipulate.

Armed with that agreement from Petitioner, Washington proposed to defendants' counsel a substantial extension of the discovery deadlines. Remarkably, defendants' counsel, Gordon & Rees – a respected San Francisco law firm that is well known for its aggressive defense of litigation on behalf of the Regents – recognized that it was only appropriate that Petitioner be allowed additional time to conduct discovery if Petitioner was going to be losing her attorney who had conducted no discovery.

Indeed, on September 22, 1998, Gordon & Rees forwarded the stipulation with Washington to the court under cover of a letter stating that "Petitioner's counsel, Miles Washington, has indicated that he will be withdrawing from this case, and Petitioner will represent herself. For that reason, we enclose a stipulation to extend the deadlines for expert disclosures, completion of

discovery, [and] hearings on dispositive motions." (Pet.App. I-1 to I-2; J-1 to J-2).

Amazingly, the district court, on September 30, 1998, nevertheless denied the parties' joint request to continue the discovery deadlines, stating without giving any reasons that the request was "not justified by good cause." (Pet.App. G-1). This was a manifest abuse of discretion because defendants could not possibly be prejudiced by a discovery extension that they had not only signed, but had written a separate letter asking the court to approve.

Two days later, on October 2, 1998, attorney Washington asked the court to approve the stipulation for his withdrawal from the case that he had extracted under duress from Petitioner. The court, however, denied the request on October 6 because it "was troubling [that] a prior request indicated that Petitioner's counsel failed to conduct all desired discovery." (Pet.App. F-1). The court readily acknowledged that allowing Petitioner's attorney to withdraw "would force Petitioner to assume self-representation at a critical stage of the proceeding . . . and the request fails to address Ms. Spell's awareness of this plight." (Pet.App. F-2).

Petitioner was thus left with an attorney who had let the discovery deadline pass without doing any discovery work, whose stipulated discovery extension had been rejected by the court, and who wanted to withdraw from the case he had botched. Yet there was still time, if Washington had begun to perform, for him at least to take proper measures to be ready to oppose defendants' inevitable motion for summary judgment.

Because Petitioner lacked confidence that Washington really would protect her interest in the future, she filed on October 23, 1998 her own motion to reopen discovery and to remove Washington as her attorney. However, the court on October 28 refused, for a second time, to remove Washington as her attorney or to reopen or extend discovery. (Pet.App. E-1 to E-4). Thus, Petitioner was still stuck with an attorney who was doing nothing to protect her interests.

What Petitioner did not know when she asked the district court to remove Washington was that defendants had filed, one week earlier on October 16, 1998, their motion for summary judgment, which was noticed for hearing on November 16. Petitioner's opposition was due November 2. In a further act of negligence and misconduct that topped even his appalling previous record, attorney Washington did not even bother to confer with Petitioner until 4:00 in the afternoon of the due date, November 2, regarding information from her necessary to oppose the summary judgment motion! Accordingly, on November 4, Petitioner filed her own *pro se* request that the hearing date be continued, which the court did grant.

Having thus been provided with strong new grounds to have Washington removed as her counsel, Petitioner on November 16, 1998 once again asked the court for that relief. Her three-page single-spaced letter made such a compelling presentation of Washington's negligence that the court finally was persuaded, the next day on November 17, to remove Washington as counsel. The court noted that Washington had placed Petitioner in an "untenable situation," and had "continued to do nothing but harm."

In the same order, the court also granted Petitioner until December 7, 1998 to file her opposition to defendants' motion for summary judgment. Petitioner did not receive the court's order until November 23, and thus had only two weeks, acting *pro se*, to oppose a massive, sophisticated summary judgment motion.

Petitioner did file her opposition to summary judgment in *pro se* on December 7, and simultaneously requested for a *third* time that discovery be reopened. For the *third* time, however, the court denied her request, stating that Petitioner had failed to state good cause for reopening discovery under Rule 56. (Pet.App. C-1 to C-2, n.1).

Because of Washington's negligence in failing to oppose defendants' motion for summary judgment, and the refusal of the district court to grant Petitioner's more than reasonable multiple requests for extension of discovery deadlines (as, again, even defendants stipulated to in light of Washington's imminent withdrawal from the case), Petitioner was forced to oppose defendant's motions *pro se* with only two weeks to do a job that she was not trained to do. Not surprisingly, Petitioner simply was not capable of preparing an effective summary judgment opposition in that amount of time.

Thus, the district court granted summary judgment because it deemed inadmissible official letters and other documents from Petitioner setting forth the disputed material facts that should preclude summary judgment. Petitioner had, in fact, failed to submit evidence in the appropriate evidentiary format. For example, she attached letters written by witnesses to her own letter to

the court, rather than providing sworn declarations from the authors of the letters affirming that they wrote them. No competent attorney would have made this mistake.

Nevertheless, Petitioner's evidence, while not properly presented in the format required for admissibility, was indeed probative of her claims and did, at the very least, indicate that there were important material facts in dispute. This evidence included, *inter alia*, the following letters from important witnesses who had personal knowledge of the retaliation and discrimination Petitioner faced at the hands of defendants: (1) A March 24, 1998 letter from a professor of U.C. Davis School of Medicine asking that Petitioner's dismissal from the school be rescinded, as she was illegally placed on academic probation (Pet.App. K-1 to K-3); and (2) An April 30, 1997 letter from another professor of the School of Medicine substantiating that Petitioner was "not given a fair opportunity to demonstrate her skills and to learn" (Pet.App. L-1 to L-3).

Petitioner also presented actual evidence (regardless of whether it technically complied with the evidentiary rules that lawyers know) that strongly corroborated these professors' favorable opinions. For example, she presented documentary evidence that she met national academic standards by passing her first medical board licensing examination, including records from her national examination demonstrating proficiency in the nephrology course that the University used as a bogus ground to dismiss her. Petitioner also presented records indicating that she passed the very pediatrics course that the University said she failed in order to justify its second dismissal of her from the medical school.

This evidence, and many other items of evidence that Petitioner was not able to present properly as a *pro se* litigant, could easily have been presented by any minimally diligent attorney who, unlike Washington, had immediately informed his client on October 16, 1998 when the summary judgment motion was served that proper opposition had to be filed within just over two weeks. It is thus indisputable that the mistake or neglect of attorney Washington constituted excusable neglect insofar as holding Washington's failure against Petitioner was concerned.

Accordingly, after summary judgment was granted, Petitioner filed on February 26, 1999, a Rule 60(b) motion for relief therefrom, this time attaching the appropriate declarations and evidence necessary to demonstrate disputed issues of material fact that should preclude summary judgment. In addition to the two professors' letters noted above, Petitioner submitted a massive amount of additional evidence, of which the following is merely a small portion: Affidavits regarding white students who acknowledged that they received preferential treatment; an affidavit from another non-minority student stating that she received many accommodations from the University, which were instrumental in her successfully completing the program; and several affidavits from minority students delineating the discrimination that they faced at the hands of the University.

However, the district court refused to consider this evidence, stating that it could not deem it newly-found evidence under Rule 60(b)(1), and that Rule 60 cannot be used to reargue matters that previously were "argued and disposed of" before the court. (Pet.App. B-3 to B-4).

In her legal memorandum in support of the Rule 60(b) motion, Petitioner plainly and clearly raised the issue that Rule 60(b) relief can be granted, and should have been granted to her, based on attorney error or neglect. However, the district court's opinion simply ignores this argument. The opinion does explain that the properly authenticated evidence belatedly presented by Petitioner could have been presented in the original opposition to summary judgment. But the court does not address that it was attorney error by Washington that caused that failure of presentation in the first place. By failing even to address Petitioner's attorney error point, the court abused its discretion.

The Ninth Circuit justified the district court's failure even to address the attorney error issue by holding that, as a matter of law, "attorney error is insufficient ground for relief under both FRCP 60(b)(1) and (6)." (Pet.App. A-1 to A-2). This ruling directly contradicts the United States Supreme Court's ruling in *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S.Ct. 1489 (1993), that attorney error or neglect certainly *can* be – though of course it is not *necessarily* – grounds for relief under that Rule. The Ninth Circuit's ruling also is contrary to the holdings of at least five other circuit courts of appeal that have applied *Pioneer* to hold that attorney error or neglect certainly *can* be remedied under Rule 60(b).[1]

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[1] The Ninth Circuit also ruled that Petitioner's Rule 60(b) motion should be denied because it "merely reiterated the arguments that she had previously presented to the district court." But this is not an independent ground for the court's ruling, separate and apart from the insufficiency of attorney error ruling. Rather, the precise point of this case is that

Under the rule of *Pioneer*, as applied in those five other circuits, the district courts must apply certain equitable tests. Whether application of those tests should result in Rule 60(b) relief in the instant case arguably is an issue for determination upon remand after this Court's corrects the Ninth Circuit's explicit, and the district court's implicit, errors of law. What cannot be disputed, however, is that it is plain error to fail and refuse to make any equitable evaluation at all, based on the notion that attorney error cannot, as a matter of law, be a ground for Rule 60(b) relief.

Because plain error was committed here, Petitioner respectfully requests that this Court grant the petition for writ of certiorari, summarily vacate the judgment of the Ninth Circuit Court of Appeals without necessity for briefing in this Court on the merits, and remand this case to the Ninth Circuit for further consideration in light of this Court's decision in the *Pioneer* case that attorney error *can* be a ground for relief from judgment under rule 60(b). Alternatively, the writ should be granted and the case calendered for plenary review by full briefing and oral argument.

Petitioner's first filing, which the Ninth Circuit said the second filing "merely reiterated," was fatally flawed because of the attorney error that the court held, as a matter of law, could not be cured under Rule 60(b). Thus, the original attorney error irrevocably doomed all further filings Petitioner could have made.

REASONS FOR GRANTING THE WRIT

The petition should be granted for four simple reasons.

(1) This Court granted certiorari almost ten years ago in *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S.Ct. 1489 (1993), to resolve a conflict among the circuit courts as to whether attorney error could constitute "excusable neglect" justifying relief from an adverse judgment against the client. *Id.* at 387 & n.3. The Court's decision eight years ago *appeared* to make clear that the answer is "Yes." The very fact the Court once granted plenary review on this question shows that it is of sufficient intrinsic importance to be worthy of this Court's consideration on the merits. The Court must have thought at the time that there was a pervasive national problem of attorney neglect of their clients' cases that caused all manner of adverse consequences to the clients, including entry of judgment against them. There is no reason to think attorney conduct has substantially improved in the past decade. Indeed, there is plenty of evidence, as even quick perusal of the "attorney error" case law will indicate, that it continues to be widespread and may even have gotten worse.

(2) Attorney error that a client is not permitted to correct through Rule 60(b) relief from judgment (or similar "excusable neglect" provisions under other federal rules) is particularly pernicious when a malpractice action against the offending attorney just will not afford full relief. In the instant case, for example, a malpractice action would not afford Petitioner the specific relief necessary to make her whole. Petitioner sought declaratory

relief from the substandard grades she received because of the University's discrimination against her. Without Rule 60(b) relief, these grades on her transcript have stigmatized her, and will forever continue to stigmatize her, as an incompetent person. Petitioner's prospects for securing acceptance at any other institution is nil, not to mention that the improper grades will haunt her for the rest of her professional career.

(3) This Court may have thought its 1993 decision in *Pioneer* definitively determined that attorney error *can* be grounds for relief under "excusable neglect" provisions such as Rule 60(b). But at least three of the circuit courts, including the Ninth Circuit in the instant case and in two cases cited in the opinion below, apparently don't think that is so. On the other hand, at least five circuit courts appear to have followed *Pioneer* in holding that attorney error is grounds for Rule 60(b) "excusable neglect" relief. This is a virtually classic case of "circuit conflict" that is a presumptive basis for this Court to grant the writ of certiorari. Even if this Court were now writing on a clean slate, a five to three split among the circuits would indicate that the Court should take the matter up and settle it.

(4) But the Court is not writing on a clean slate because, as noted above, the Court already perceived a similar circuit split almost a decade ago and thought it was resolving the matter. That some of the circuits are not adhering to that resolution – as dramatically evidenced by the Ninth Circuit's bald statement below that attorney may ***never*** be grounds for Rule 60(b) relief – suggests that the Court does not even have to accept this case for full

plenary review and attempt for a second time to resolve the circuit split.

Rather, the Court could very reasonably grant the petition for writ of certiorari, summarily vacate the judgment of the Ninth Circuit, and remand for further proceedings consistent with the holding of *Pioneer* that attorney error must be given full and fair review as an equitable ground for Rule 60(b) relief in this case.

LEGAL ARGUMENT

The Ninth Circuit Court of Appeals affirmed the district court's denial of Petitioner's Rule 60(b) motion by invoking a rule of law – that attorney error can ***never*** be the basis for relief under Rule 60(b) from a judgment – that is contrary to this Court's ruling in *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S.Ct. 1489 (1993). While a majority of the circuit courts have followed *Pioneer* by holding that attorney error ***can*** be a basis for relief, the Ninth Circuit, along with the Fifth and Tenth Circuits, fails to follow *Pioneer* by establishing a *per se* rule that attorney error can never qualify.

The Supreme Court should grant certiorari both to resolve this substantial division of authority among the circuits, and to clarify and reaffirm that this Court's decision in *Pioneer* requires that the district courts give full and fair consideration to claims of attorney error as a basis for relief under Rule 60(b) from judgments.

Alternatively, because the district court and the Ninth Circuit committed plain error in establishing a *per se* rule that is foreclosed by the *Pioneer* decision, this Court should grant certiorari and then summarily vacate the judgment of the Ninth Circuit, without need for further briefing or argument in this Court, and remand this matter to the Ninth Circuit for further proceedings consistent with *Pioneer*.

Rule 60(b)(1) provides that relief from judgment may be obtained in the following instances: "mistake, inadvertence, surprise, or excusable neglect." F.R.C.P., Rule 60(b)(1). Under the rubric of "excusable neglect," courts in at least five circuits held that attorney error may be sufficient cause to grant relief from judgment. *See, e.g., Pratt v. Philbrook*, 109 F.3d 18, 19 (1st Cir. 1997); *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2d Cir. 1997); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988); *Castro v. Bd. of Ed. of the City of Chicago*, 214 F.3d 932, 934 (7th Cir. 2000); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 849 (11th Cir. 1996).

However, the Ninth Circuit in the instant case, following two prior decisions of that court that it cites, joins the Fifth and Tenth Circuits in holding that attorney error may ***never*** be a basis for Rule 60(b) relief from judgment. These three circuits have thus failed to follow the teaching of *Pioneer*.

In *Pioneer*, this Court held that a creditor should be able to file his Proof of Claim late because his attorney failed to inform him that he must file it by a date certain. While acknowledging the general principle that the acts

and omissions of an attorney are attributable to and bind his or her clients, this Court clearly held that there cannot be a *per se* rule that the attorney's error must always foreclose the client's right to obtain relief from the consequences of that error. *Id.* at 381.

In *Pioneer*, the creditor was granted relief on the basis of Bankruptcy Rule 9006(b)(1) that allows courts to accept late filings on the basis of "excusable neglect," which also is one of the predicates for relief from judgment contained in Rule 60(b). Indeed, *Pioneer* explicitly linked the bankruptcy rule with Rule 60(b): "[A]t least for the purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394.

In 1996, three years after *Pioneer*, this Court made clear that the *Pioneer* holding is not confined to the bankruptcy field, as the United States had originally argued before the Solicitor General reversed that position. Rather, said the Court, the *Pioneer* principle applies as well to client relief from the consequences of attorney error (untimely appellate filing) under the similar "excusable neglect" provision of Rule 4 of the Federal Rules of Appellate Procedure. *Stutson v. United States*, 516 U.S. 193, 197, 116 S.Ct. 600 (1996). Accordingly, just as we primarily request here, the *Stutson* Court granted certiorari, summarily vacated the erroneous ruling of the circuit court, and remanded for further consideration in light of *Pioneer*. *Id.* at 197-98.

By parity of reasoning, if attorney error may afford a basis for relief from judgment arising from attorney error

under the "excusable neglect" provision of the bankruptcy rule and the appellate procedure rule, the same legal principle should apply when "excusable neglect" is used in Rule 60(b), as indeed this Court's reference to Rule 60(b) in the *Pioneer* decision has already indicated.

As noted above, at least five of the circuits appear, in deciding Rule 60(b) attorney error cases, to have understood this Court's message from the *Pioneer* and *Stutson* cases. But at least three other circuits, including the Ninth, apparently have not understood the message. This is rather surprising, given that this Court expressly granted certiorari in *Pioneer* to resolve circuit conflict existing almost ten years ago with respect to rules of procedure such as Federal Rules of Appellate Procedure, Rule 4(a)(5), Rule 60 and others regarding excusable neglect. 507 U.S. at 387.

The Ninth Circuit's erroneous ruling in the instant case is thoroughly discussed above in this petition. The two prior Ninth Circuit decisions the court cites – *Allmerica Financial Life Insurance & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1998) and *Engelson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043-44 (9th Cir. 1992) – apply the same incorrect *per se* rule that attorney error cannot be Rule 60(b) excusable neglect.

The Tenth Circuit also got it wrong in *Servants of the Paracalete v. Does*, 204 F.3d 1005, 1010 (10th Cir. 2000), holding that confusion between local and lead counsel regarding entry of judgment was insufficient under Rule 60(b)(1) to constitute excusable neglect in the context of Rule 4(a)(5) of the Federal Rules of Appellate Procedure. *See also, Pelican Production Corp. v. Marino*, 893 F.2d 1143,

1146 (10th Cir. 1990) ("carelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1)"). Similarly, the Fifth Circuit in *Bohlin v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993), held that "when the reason asserted in justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court", relief on the basis of Rule 60(b)(1) is improper.

This conflict among the circuits regarding relief from attorney error speaks volumes about the enormous injustice that visits many clients in this nation. The cases cited above, including the instant case, apparently constitute only a small fraction of the enormously distressing range of attorney error that destroys the rights of diligent clients. The facts herein are particularly egregious in regard to attorney Miles Washington's dereliction of duty that destroyed Petitioner's case. But hers is far from the only such case, and quite probably far from the worst such case.

CONCLUSION

This Court almost a decade ago thought the problem of clients being victimized by attorney error was pervasive enough for the Court to step in to provide some guidance. The problem remains pervasive, but some district and circuit courts are not getting the message. Accordingly, the Court should once again step in, either (a) by granting the petition and summarily reversing and remanding to the Ninth Circuit and the district court for full and fair consideration of Petitioner's claim for relief

under Rule 60(b) from the judgment against her, or (b) granting the petition and setting the matter for plenary consideration through the regular briefing and argument process in this Court.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELA R. SPELL, Plaintiff-Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ERNEST L. LEWIS; DONAL A. WALSH; D. ROBERTO PAEZ; GEORGE A. KAYSEN, Defendants-Appellees.	No. 99-16216 D.C. No. CV-96-01472-GEB MEMORANDUM[1] (Filed Sep. 25, 2000)

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted September 11, 2000[2]

Before: WALLACE, BEEZER, and FERNANDEZ, Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Spell's request for oral argument is denied.

Angela R. Spell appeals pro se the district court's order denying her motion pursuant to Federal Rule of Civil Procedure 60(b). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion the denial of a Rule 60(b) motion for relief from judgment. *See Maraziti v. Thorpe*, 52 F.3d 252, 253 (9th Cir. 1995), and we affirm.

The district court did not abuse its discretion in denying Spell's motion for reconsideration because "attorney error is insufficient grounds for relief under both Rule 60(b)(1) and (6)," *see American Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1998); *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043-44 (9th Cir. 1992), and because Spell's Rule 60(b) motion merely reiterated the arguments that she had previously presented to the district court, *see Maraziti*, 52 F.3d at 255.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ERNEST L. LEWIS; DONAL A. WALSH; D. ROBERTO PAEZ; and GEORGE A. KAYSEN, Defendants.	CIV-S-96-1472 GEB PAN ORDER* (Filed May 12, 1999)

Pending are two motions by Plaintiff for reconsideration of the Order filed January 14, 1999, which granted Defendants' motion for summary judgment.[1] For the reasons stated below, the motions are denied.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] On April 26, 1999, the hearing date on Plaintiff's first motion for reconsideration, Plaintiff sent a letter to the Court requesting that the hearing on that motion be vacated in favor of a hearing on a second motion for reconsideration which Plaintiff proposed to be rescheduled for May 24, 1999. *See* Letter from A. Spell to the Court of Apr. 26, 1999, at 2-3. However, since the first motion had already been fully briefed and taken under submission by the time the Court received Plaintiff's April 26 letter, Plaintiff's request to vacate the first hearing date is moot.

On April 28, 1999, Plaintiff noticed and filed a largely duplicative second motion for reconsideration with a

"A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Under Rule 59(e), which expressly requires that a motion to alter or amend a judgment must be served no later than ten days after entry of judgment, Plaintiff's motions are time-barred. Judgment was entered for Defendants on January 14, 1999. Plaintiff did not file and serve her first motion until February 3, 1999, and her second motion until April 28, 1999. Therefore, to the extent the motions seek relief under Rule 59, they are denied as untimely. *See Carter v. United States*, 973 F.2d 1479, 1488 (9th Cir. 1992).

"proposed" hearing date of May 24, 1999. In response, Defendants' attorney sent a letter to the Court requesting "an order indicating whether or not this second motion for reconsideration will be entertained by the court, and how we should proceed further, if at all." Letter from M. Bruno to the Court dated May 5, 1999, at 2 (ordered to be filed concurrently herewith). Plaintiff followed with a letter proposing a hearing date of June 21, 1999, "on the original and all related motions" and requesting "that the Court require the Defendants to send all future mail service by certified mail with a return receipt. . . . " Letter from A. Spell to the Court dated May 7, 1999, at 3 (ordered to be filed concurrently herewith). The parties are admonished that "[o]riginal documents to be filed or lodged shall not be mailed to the chambers of a Judge" in lieu of filing or lodging as required by the Local Rules. L.R. 5-134(a). Given the dispositions of Plaintiff's motions for reconsideration, the parties' respective requests are denied as moot.

Under Rule 60(b) Plaintiff's motions are timely, but to obtain the relief she seeks, Plaintiff must demonstrate (1) newly discovered evidence; (2) mistake, surprise, or excusable neglect; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) " 'extraordinary circumstances' which would justify relief." *ACandS*, 5 F.3d at 1263; L.R. 78-230(k). Plaintiff fails to do this.

The evidence Plaintiff offers in support of her motions does not constitute "newly discovered evidence" within the meaning of Rule 60. "Evidence is not 'newly discovered' . . . if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987). The majority of affidavits and other documents Plaintiff offers as "new evidence" predate the due date for Plaintiff's summary judgment opposition papers. Plaintiff fails to satisfy her burden of showing, as required in a motion for reconsideration of a grant of summary judgment based upon newly discovered evidence, that the evidence she now provides could not have been discovered and produced at summary judgment. *See Frederick S. Wyle Professional Corp. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985). Instead, Plaintiff claims ignorance as a *pro se* litigant "of the requirement for attachment of material evidence to support each claim." Pl.'s Opening Br. filed Apr. 28, 1999, at 22. However, "*pro se* litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Plaintiff's failure to timely file documents in opposition to summary judgment "does not turn the late filed documents into 'newly discovered evidence.' " *ACandS*, 5 F.3d at 1263.

Nor has Plaintiff otherwise demonstrated why the Court should reconsider the January 14 Order. The arguments Plaintiff offers in support of her position are essentially restatements of prior arguments. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of" or as an attempt to relitigate "a point of disagreement between the Court and the litigant." *Wave v. First Citizen's Nat'l Bank*, 846 F. Supp. 310, 314 n.3 (M.D. Pa.), *aff'd*, 31 F.3d 1175 (3d Cir. 1994). In sum, because Plaintiff's motions for reconsideration do not present the type of newly discovered evidence or other "extraordinary circumstance" that would warrant disturbing the judgment in favor of Defendants under Rule 60(b), they are denied. *See Maraziti v. Thorpe*, 52 F.3d 252, 254-55 (9th Cir. 1995).

No motions for reconsideration, rehearing, clarification, stay, or any other submissions shall be filed or entertained in this closed docket.

IT IS SO ORDERED.

DATED: May 12, 1999

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiffs, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ERNEST L. LEWIS, DONAL A. WALSH, D. ROBERTO PAEZ, and GEORGE A. KAYSEN, Defendants.	CIV S-96-1472 GEB PAN ORDER* (Filed Jan. 14, 1999)

Defendants the Regents of the University of California ("Regents"), Ernest L. Lewis ("Lewis"), Donal A. Walsh ("Walsh"), D. Roberto Paez ("Paez"), and George A. Kaysen ("Kaysen") move for summary adjudication of each of Plaintiff's nine causes of action. Plaintiff opposes the motion.[1] For the reasons stated below, the motion is granted.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] As a preliminary matter, Plaintiff requests "an extension of discovery time for additional document requests, interrogatories and to depose [ ] four witnesses of the Court deems this necessary, just and proper in order for the plaintiff to further oppose Defendant's Motion for Summary Judgment." *See* Pl.'s Opp'n at 2. Plaintiff's request is denied for at least two separate reasons.

First, Plaintiff fails to demonstrate that her request is justified by good cause. As Plaintiff was informed in the Order filed October 28, 1998, modification of deadlines imposed in a scheduling order issued under Federal Rule of Civil Procedure 16, requires a showing that the requested modification is justified by good cause. Since the time for conducting discovery has passed under the applicable Rule 16 orders, Plaintiff was required to show that reopening discovery is supported by good cause. "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment. . . . If that party was not diligent, the inquiry should end." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Here, Plaintiff faults her previous attorney's failure to conduct "professional discovery," *see* Pl.'s Opp'n at 2, but as Plaintiff was informed in the October 28 Order, "as a general rule an attorney's blunder binds his client." *See* Order filed Oct. 28, 1998, at 3 (quoting *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998)). Since Plaintiff has failed to show that even through the exercise of diligence she could not meet the deadline in the Rule 16 scheduling order, the inquiry should end. *See Johnson*, 975 F.2d at 609. Furthermore, "the movant cannot complain if [she] fails to pursue discovery diligently before summary judgment." *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1442 (9th Cir. 1986).

Second, Plaintiff failed to provide an affidavit setting forth particular facts expected from discovery and she failed to show how the proposed discovery would preclude summary adjudication of any issue. "References in memoranda and declarations to a need for discovery do not qualify as motions under [Federal] Rule [of Civil Procedural] 56(f)." *Brae*, 790 F.2d at 1443. Rather, Rule 56(f) requires litigants to submit affidavits setting forth the particular facts expected from further discovery. "Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment." *Id.*

I.
BACKGROUND

Plaintiff, who is an African-American female, enrolled at the University of California, Davis School of Medicine ("UCDSOM") in September 1991. During the first quarter there, Plaintiff proposed and UCDSOM accepted that she be allowed to "split" her first-year course load, making her eligible for a Doctor of Medicine degree in five years instead of four. At the end of the first quarter, Plaintiff took her Psychiatry final examination late. At the end of her second quarter, Plaintiff took the Physiology final examination late. During the fourth quarter, she sought to take a Pathology midterm examination late but elected to drop the course instead.

During the Fall quarter of her second year at UCDSOM, on the day of the Hematology final examination, Plaintiff requested that Dr. Frederick Meyers, chief of the Oncology/Hematology division, postpone the examination. Plaintiff cited personal problems involving a domestic violence situation a week and a half earlier as the reason for her unpreparedness to sit for the examination as scheduled. Dr. Meyers rescheduled Plaintiff's examination for the following Monday. Plaintiff traveled to San Francisco on the Saturday before the rescheduled examination to go dancing with friends at a nightclub and did not return home until Sunday, and on Monday, immediately before the rescheduled examination was to commence, Plaintiff telephoned Dr. Meyers to request an "incomplete" in Hematology. Dr. Meyers insisted that

Plaintiff take the examination, as rescheduled, but Plaintiff refused, after which time she was assigned an "F" or failing grade in the course.

As a result of having received the failing grade, Plaintiff was called before the Student Evaluation Subcommittee ("SEC"), which recommended that Plaintiff be allowed to repeat Hematology and placed on academic probation until the end of the quarter following the quarter in which she was to remediate her deficiency. Plaintiff then applied to retroactively drop Hematology but was refused because her application was late.

In the Winter quarter of her second year at UCDSOM, after receiving a "D" grade on the Neurological Core examination as well as the re-examination and a "Y" grade in her Family Practice Preceptorship, which indicates work in progress of non-passing quality, Plaintiff was called before the SEC again. The SEC recommended that Plaintiff take a leave of absence and required her to repeat her second year in its entirety and to remain on probation until she completed her second year curriculum.

In the Fall quarter of her third year, Plaintiff earned one "B" and two "C" grades. In the Winter quarter, Plaintiff requested postponement of her Pharmacology final examination but failed the examination when she did take it, as rescheduled. On a re-examination, Plaintiff earned a "C" grade in the class.

In the Fall quarter of Plaintiff's fourth year at UCDSOM, Plaintiff was diagnosed with a learning disability for which the University's Disability Resource Center prescribed additional time on tests and suggested

that Plaintiff use audio-taped books to assist in her reading.

In the Spring quarter of Plaintiff's fourth year, on the day of the Nephrology final examination, Plaintiff requested that Defendant Dr. Kaysen postpone the examination for her, citing recent housing difficulties occasioned by purchasing a new home as the reason for her unpreparedness. Dr. Kaysen assured Plaintiff that she would do well on the examination if she had attended classes and studied the materials, but Plaintiff indicated to him that she had not. Dr. Kaysen required Plaintiff to take the examination, which she failed. The re-examination was scheduled for June 21, 1995, five days after Plaintiff sat for the four-day United States Medical Licensing Examination ("USMLE"), step I. After the third day of the USMLE, Plaintiff learned that her son was missing. Plaintiff completed the fourth day of the USMLE and learned her son's whereabouts either the next day or the day after. On June 20, 1995, Plaintiff's then-fiancé called Defendant Associate Dean Lewis to explain the situation and to request rescheduling of the already-rescheduled Nephrology examination. Plaintiff herself did not contact Dean Lewis. The postponement was denied, and Plaintiff failed the re-examination.

Plaintiff was then called before the SEC a third time, and the SEC recommended that she be allowed to retake the Nephrology examination and to gain credit by examination. The Promotions Board considered the SEC's recommendation but determined, in view of Plaintiff's record in its entirety, that Plaintiff should be dismissed. Plaintiff was dismissed on July 31, 1995.

Plaintiff appealed her dismissal and was reinstated on the basis of "clemency," which carried with it certain conditions, including no further delays in her academic schedule, as she had yet to complete the curriculum of the second year, and that she remain on probation for the remainder of her medical school career. Plaintiff re-entered UCDSOM in March 1996 and received a "Y" grade in her Pediatrics rotation, having received both an "Unsatisfactory" on the hospital component and a failing grade on the nationally standardized written examination.

After Plaintiff received these grades, she was called once more before the SEC, which made a series of recommendations short of dismissal. The Promotions Board rejected these recommendations and unanimously voted to dismiss Plaintiff, after considering her entire record. Plaintiff was dismissed on November 25, 1996. She applied for an extension of her registration pending appeal of her dismissal, which was denied.

On August 14, 1996, Plaintiff filed this action. She alleges claims under 42 U.S.C. § 1983 ("section 1983"), 42 U.S.C. § 2000d, et seq. ("Title VI"), 20 U.S.C. § 1681 ("Title IX"), 29 U.S.C. § 794 ("Rehabilitation Act"), 42 U.S.C. § 12101, et seq. ("Americans with Disabilities" or "ADA"), and 20 U.S.C. § 1232g ("Family Educational Rights and Privacy Act" or "FERPA").

II.
STANDARD OF REVIEW

Summary judgment is proper where no genuine issue exists as to any material fact and the movant is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c). Viewing the evidence in the light most favorable to the nonmovant, the court must determine whether the movant has demonstrated the absence of any genuine issue of material fact. *State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir.), *cert. denied*, 474 U.S. 968 (1985).

Once the movant has made a prima facie showing that no genuine issue exists as to any material fact, the burden of showing otherwise shifts to the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The nonmovant must then affirmatively establish a genuine issue of material fact as to each element for which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The nonmovant cannot avoid summary judgment simply by resting on its pleadings or relying on mere allegations or denials" where it bears the burden of showing a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir. 1994). In short, where the record could not lead a rational trier of fact to find for the nonmovant, there is no genuine issue for trial and summary judgment must be granted. *Matsushita*, 475 U.S. at 585-87.

III.

ANALYSIS

A. Individual Liability Under Title VI and Title IX

The individual Defendants seek summary judgment on Plaintiff's claims under Title VI and Title IX, arguing

that neither statute permits actions against individuals. Although Plaintiff contends that individual liability under these statutes was decided in this Court's order filed October 31, 1997, this argument both misconstrues the order and misses the mark.[2] As the Supreme Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 695 (1979), both statutes prohibit discrimination by educational institutions, and both provide administrative remedies for ending federal aid to institutions which discriminate. Thus, the goal of both Title VI and Title IX is to prevent institutional discrimination, and only the institutional recipients of federal funds, as opposed to individuals, may be sued for damages. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576-77 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995). Accordingly, the individual Defendants are granted summary judgment on Plaintiff's claims under Title VI and Title IX.

B. Race Discrimination Under Title VI

The Regents argue that Plaintiff's claim of race discrimination under Title VI must fail because she cannot show that she was dismissed from UCDSOM without valid cause, nor can she show that other, similarly situated non-minority students were treated differently. *See*

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[2] The order dismissed Plaintiff's claim under Title IX as against the individual Defendants, stating that the Supreme Court has not recognized an implied cause of action against individuals under Title IX. *See* Order filed Oct. 31, 1997, at 3.

Defs.' Mot. at 25. Plaintiff counters that disputed facts regarding more favorable treatment of non-minority students make summary adjudication of Plaintiff's Title VI race discrimination claim inappropriate. *See* Pl.'s Opp'n at 5.

"In *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), a majority of the Court held that a violation of Title VI required proof of discriminatory intent." *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir. 1986). The Regents have presented evidence unrefuted by Plaintiff that demonstrates purely academic reasons for the alleged adverse actions Plaintiff experienced. For example, before deciding to dismiss her, "the Promotions Board carefully and deliberately considered [Plaintiff's] entire record [at UCDSOM] and came to the conclusion that she had not demonstrated the personal and academic responsibility necessary to complete the medical school curriculum and to function as a safe and responsible physician." *See* Lewis Decl., ¶ 21. Indeed, Plaintiff had failed three courses, despite numerous postponements of final examinations, had taken a leave of absence, was on academic probation for the majority of her medical school career, and by the time she was dismissed the second time, had been "subject to dismissal twice before, dismissed once, and reinstated but still showed the same problems which plagued her earlier." *Id.* at ¶¶ 16, 17, 18, 21.

Although Plaintiff contends that "[e]vidence exists showing a pattern of more favorable treatment for white students to accommodate personal exigencies," *see* Pl.'s Opp'n at 5, she has failed to proffer such evidence. Plaintiff styles her response to Defendants' undisputed facts as

a declaration, but the incidents she recounts as evidence of more favorable treatment of non-minority medical students are not based on personal knowledge, and only declarations based on personal knowledge can be considered on summary judgment. *See* Fed. R. Civ. P. 56(e) (affidavits supporting summary judgment must be based on personal knowledge); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (stating that the object of Federal Rule of Civil Procedure 56(d) "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"). Similarly, while Plaintiff catalogues numerous "racist and abusive remarks" allegedly made about others by Lewis, *see* Pl.'s Decl. of Disputed Facts at 15-18, and "racist statements" allegedly made about Plaintiff by Walsh, *see id.* at 12-13, these statements are all inadmissible hearsay.[3] *See* Fed. R. Civ. P. 56(e).

The Supreme Court has admonished that "[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment [and] may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). Here, the evidence

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[3] Plaintiff's failure to produce admissible evidence may be attributable to her *pro se* status; however, "*[p]ro se* litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

shows that Plaintiff's unsatisfactory grades and dismissals from UCDSOM were academic decisions that did not not depart from the accepted academic norms, and Plaintiff's "[m]ere conclusory assertions of discriminatory intent . . . cannot be sufficient to avert summary judgment." *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994). Accordingly, the Regents are granted summary adjudication of Plaintiff's claim of race discrimination under Title VI.

C. Gender Discrimination under Title IX

The Regents next argue that Plaintiff has failed to raise a triable issue of fact of gender discrimination under Title IX. The pertinent provision of Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . . " 20 U.S.C. § 1681(a). Thus, in order to prevail on a Title IX claim for gender discrimination, Plaintiff must show that the Regents discriminated against her because of her gender.

Plaintiff has not made this showing. As with the evidence Plaintiff proffers in support of her race discrimination claim, none of the evidence she proffers in support of her gender discrimination claim is admissible. *See, e.g.*, Pl.'s Decl. of Disputed Facts at 11. Moreover, the Regents have produced unrefuted evidence showing that the academic treatment Plaintiff received at UCDSOM resulted from Plaintiff's own academic shortcomings and was

unrelated to her gender, *see* Lewis decl., ¶ 21, and Plaintiff has failed to produce evidence demonstrating that these purely academic decisions should be disturbed. *See Ewing*, 474 U.S. at 226 (stating that federal courts are "far less . . .-suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require 'an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decisionmaking' "). Accordingly, the Regents are granted summary adjudication of Plaintiff's claim of gender discrimination under Title IX.

D. Retaliation Claim under Title VI and First Amendment Claim

Although Defendants concede that Plaintiff engaged in protected activity prior to her dismissal and denial of an extension on her registration, Defendants argue that they are entitled to summary adjudication of Plaintiff's Title VI retaliation claim and her First Amendment claim because Plaintiff cannot establish a causal connection between the protected activities and the adverse actions. Plaintiff counters that "[e]vidence exists showing a clear causal link between [her] protected activity and retaliatory academic treatment." *See* Pl.'s Opp'n at 5.

Title VI prohibits retaliation by a recipient of federal funds against any individual for exercising rights under Title VI. 34 C.F.R. § 100.7(e). Although Plaintiff alleges a separate cause of action under section 1983 for violation of the First Amendment arising out of Defendants' allegedly retaliatory acts against her for complaining of

disparate treatment, because the substance of Plaintiff's First Amendment cause of action and her cause of action for retaliation under Title VI are the same, they are analyzed together. A plaintiff may establish a prima facie case of retaliation by showing that (1) she engaged or was engaging in activity protected under Title VI, (2) the defendant subjected her to an adverse action, and (3) there was a causal link between the protected activity and the defendant's action. *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (Title VII case); *see Smith v. Barton*, 914 F.2d 1330, 1336 (9th Cir. 1990) (stating that courts look to Title VII to determine appropriate rules under Title VI).

Here, Plaintiff has failed to produce any admissible evidence demonstrating a causal connection between protected activity in which she engaged and Defendants' adverse actions. Rather, the evidence reveals that, despite demonstrated leniency on the part of Defendants in accommodating Plaintiff's various difficulties, Plaintiff was unable to meet the academic standards of a medical student. Regardless of Plaintiff's protected activities, "it nevertheless remains true that [her] dismissal from [UCDSOM] rested on an academic judgment that is not beyond the pale of reasoned academic decision-making when viewed against the background of [her] entire career at [UCDSOM]." *Ewing*, 474 U.S. at 228. Therefore, Defendants are granted summary adjudication of Plaintiff's Title VI retaliation claim and section 1983 claim for violation of the First Amendment.

E. Disparate Impact Claim under Title VI

The Regents next argue that they are entitled to summary adjudication on Plaintiff's disparate impact claim. First, the Regents argue that since Plaintiff is challenging title VI itself, rather than the regulations designed to implement the purposes of Title VI, Plaintiff's claim of disparate impact must fail because there can be no cause of action for unintentional discrimination or disparate impact under Title VI itself. *See* Defs.' Mot. at 32. Second, the Regents argue that even if Plaintiff's claim were construed as a claim to enforce Title VI's regulations, it would fail because the Regents have demonstrated an educational necessity for enforcing academic standards. *See id.* at 34. The Regents are correct on both arguments.

First, "Title VI itself directly reache[s] only instances of intentional discrimination," and Plaintiff has not sued to enforce the statute's regulations. *Alexander v. Choate,* 469 U.S. 287, 293 (1985). Second, even assuming Plaintiff's claim of disparate impact could be construed as a cause of action brought to enforce the regulations, Plaintiff's claim still fails because it is factually unsupported. The statistics Plaintiff proffers in support of this claim constitute impermissible lay opinion or expert opinion by an unqualified expert. Fed. R. Evid. 701, 702, 703. An "expert opinion may defeat summary judgment if it appears the expert is competent to give an opinion and the factual basis for the opinion is disclosed" but an opinion "not of sufficient quantum or quality [will not] create genuine issues of material fact." *Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1222 (9th Cir. 1995). Since Plaintiff's

opinion regarding enrollment trends in California medical schools is not "based upon specific facts," the inferences of disparate impact that Plaintiff seeks to draw from it "are not of sufficient quantum or quality to create genuine issues of material fact." *Id.* Finally, even assuming Plaintiff established a prima facie case of discriminatory impact, the Regents have demonstrated that the academic standards Plaintiff is apparently challenging have "educational necessity," *Board of Education v. Harris,* 444 U.S. 130, 151 (1979), to wit, ultimately "putting into the community doctors who are competent to safely practice medicine and treat patients," *see* Defs.' Mot. at 35. As the Supreme Court observed in *Ewing,* it is appropriate for a university to conclude that a particular student's "sensitivity to difficulties in [her] personal life suggested an inability to handle the stress inherent in a career in medicine." *Ewing,* 474 U.S. at 228 n.13. Therefore, the Regents are granted summary adjudication of Plaintiff's Title VI claim of disparate impact.

F. FERPA Violations

Defendants next argue that summary adjudication must be granted on Plaintiff's FERPA cause of action because she has not alleged an actionable violation of any rights secured by FERPA. Plaintiff counters that her FERPA claim should go to trial.

FERPA requires federally funded educational institutions to provide post-secondary students an opportunity to inspect their educational records and to have a hearing to challenge alleged inaccuracies in the same and to consent to release of information contained therein. 20 U.S.C.

§ 1232g(d). Here, Plaintiff alleges not that Defendants denied her the right to inspect her records but the right to "timely inspect" them. *See* Pl.'s Second Am. Compl., ¶ 80. However, FERPA secures no such right. *See* 20 U.S.C. § 1232g(a)(1)(A) ("No funds . . . shall be made available to any State educational agency . . . that has a *policy* of denying, or effectively prevents . . . students the right to inspect and review education records . . . ") (emphasis added); *see also Smith v. Duquesne Univ.*, 612 F. Supp. 72, 79 (W.D. Pa. 1985) ("The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of so many institutions to carelessly release student records."). Plaintiff further contends that Defendants' alleged refusal to place certain items in her academic record constitutes barring her from correcting her record. *See* Pl.'s Second Am. Compl., ¶¶ 40c, 54, 59. However, the right secured by FERPA is to challenge the accuracy of the record in a hearing, *see* 20 U.S.C. § 1232g(2), and Plaintiff has failed to present evidence that she was denied this right. In fact, the evidence shows that Plaintiff was offered the opportunity to review her file after she complained items were missing from it. *See* Lewis Decl., Exh. G. Finally, Plaintiff contends that the confidentiality of her records was breached. *See* Pl.'s Decl. of Disputed Facts at 97. However, no private right of action exists for confidentiality violations under FERPA; instead, FERPA provides expressly that the Secretary of Education is responsible for enforcing its provisions and protections. *Norris by Norris v. Board of Educ. of Greenwood Community School Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992). Accordingly, Defendants are granted summary

adjudication of Plaintiff's section 1983 claim for alleged violations of FERPA.

G. Due Process Claims

Next, Defendants argue that summary adjudication of Plaintiff's due process claims is proper because Plaintiff cannot show a deprivation of this right. Plaintiff claims that she was denied due process when she was denied proper academic advising, placed and kept on probation, assigned unsatisfactory or substandard grades, and dismissed from UCDSOM. *See* Pl.'s Second Am. Compl., ¶¶ 84-86.

Plaintiff, however, fails to proffer evidence of any of these alleged violations, and in light of the "narrow avenue for judicial review" of academic decisions, *see Ewing*, 474 U.S. at 227, the evidence in this case reveals no aberrations from the accepted academic norms. Indeed, like Mr. Ewing, who was also a disappointed medical student, Plaintiff "accumulated an unenviable academic record characterized by low grades, [ ] incompletes, and several terms during which [s]he was on an irregular or reduced course load." *Id.* The evidence shows that Plaintiff's professors did accommodate some of her requests to postpone examinations and allowed her to re-take examinations she had failed.[4] The evidence also shows that Plaintiff was accorded the opportunity to be heard at each of the SEC meetings at which she was advised of the

[4] It should be noted that Plaintiff sued the one professor, Dr. Kaysen, who required her to sit for the examination as scheduled.

consequences of being unable to meet the academic standards of UCDSOM. Although she complains of not having received adequate instruction on certain policy options regarding grade changes, it is undisputed that all UCDSOM policy options are described in "The Rules of the Game," a booklet Plaintiff received upon first arriving at UCDSOM but did not read until it was too late. *See* Dep. of Angela Spell at 272. Although she alleges that she was assigned unsatisfactory or substandard grades, there is no evidence that Plaintiff received these grades for anything other than her performance. Finally, when Plaintiff was dismissed from UCDSOM the second time, after having been reinstated subject to certain conditions, "[t]he ultimate decision to dismiss [her] was careful and deliberate." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 85 (1978). Plaintiff was "awarded at least as much due process as the Fourteenth Amendment requires." *Id.* Accordingly, Defendants are granted summary adjudication on Plaintiff's due process claims.

H. ADA and Rehabilitation Act Claims[5]

Lastly, Defendants argue that summary adjudication on Plaintiff's ADA and Rehabilitation Act claims must be granted because Plaintiff cannot establish a prima facie

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[5] Since Rehabilitation Act law is "widely used to interpret reasonable accommodation under the ADA," Plaintiff's claims under the ADA and the Rehabilitation Act are analyzed together. *Barnett v. U.S. Air, Inc.*, 157 F.3d at 750 (9th Cir. 1998); *see also Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1234 (9th Cir. 1998) (stating that the ADA is "modeled after" the Rehabilitation Act).

case of disability discrimination. Plaintiff counters that the mere fact of her diagnoses with post-traumatic stress disorder and a learning disability bars summary adjudication of these claims.

To establish a prima facie case of disability discrimination, Plaintiff must show that (1) she was an individual with a disability (2) who was otherwise qualified and (3) who was denied participation in a program or activity receiving federal funds (4) solely because of her disability. *Smith,* 914 F.2d at 1338. For the purposes of this motion, Defendants do not dispute that Plaintiff was an "individual with a disability"; rather, they argue that Plaintiff cannot show that she was "otherwise qualfied" for retention at UCDSOM at the time of her dismissal. *See* Defs.' Mot. at 52. To be "otherwise qualified" for retention, Plaintiff must be capable of satisfying the academic and technical requirements set by UCDSOM with the aid of reasonable accommodations. 45 C.F.R. § 84.3(k)(3). It is Plaintiff's burden to establish the existence of a reasonable accommodation that would have enabled her to meet the UCDSOM program requirements. *Barnett,* 157 F.3d at 749. Plaintiff, however, has failed to establish the existence of a reasonable accommodation that would have allowed her to meet the requirements. Indeed, Plaintiff's repeated difficulties demonstrate that she could not, in fact, meet those requirements. Furthermore, as Defendants argue, Plaintiff's failures which led to her dismissals "had nothing whatsoever to do with her disability but were occasioned by her personal life." *See* Defs.' Mot. at 54. Plaintiff herself cited various personal problems including a domestic violence situation and housing difficulties as the reasons behind her

unpreparedness to sit for scheduled examination, and after her Hematology examination was rescheduled, Plaintiff traveled to San Francisco to go dancing and then refused to take the examination as rescheduled. The evidence suggests that unless UCDSOM's academic standards were substantially lowered, Plaintiff could not continue to participate in the medical training program from which she was dismissed. The Supreme Court has made clear that "[s]ection 504 [of the Rehabilitation Act] imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979). Accordingly, Defendants are granted summary adjudication of Plaintiff's claims under the Rehabilitation Act and the ADA.

IV.
CONCLUSION

For the foregoing reasons, Defendants are granted summary judgment on Plaintiff's entire complaint. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

DATED: January 8, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	CIV-S-96-1472 GEB ORDER (Filed Nov. 17, 1998)

By letter filed November 16, 1998, Plaintiff requests that she be relieved of attorney Miles Washington's representation. *See* Letter from Angela R. Spell to the Court of Nov. 16, 1998. Specifically, she requests that "the Court [] consider that although it may have acted in the interest of duty not to leave [her] the plaintiff in a 'predicament,' the Court['s] most recent orders regarding representation have forced [Plaintiff] to proceed with an untenable situation that is potentially irreparable." *See id.* at 3. Plaintiff states that "[t]he current representation has placed [her] in a position where [her] attorney has continued to do nothing *but* do harm." *See id.* (emphasis in original). Plaintiff notes that Mr. Washington failed to oppose Defendants' pending motion for summary judgment and has otherwise "continued to fail to perform his duty to his client." *See id.* at 2.

In light of the foregoing, Plaintiff's request is granted. Plaintiff shall file and serve her opposition to the pending motion for summary judgment by December 7,

1998, and reply papers, if any, shall be filed and served by December 14, 1998. *See* L.R. 78-230. The matter will then be deemed submitted on the parties' papers. The final pretrial conference currently scheduled for December 14, 1998, is continued to January 11, 1999, at 3:30 p.m.

IT IS SO ORDERED.

Dated: November 17, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant.	)	NO. CV S-96-1472 GEB ORDER (Filed Oct. 28, 1998)

Plaintiff Angela R. Spell filed an unnoticed motion on October 23, 1998, "to reopen discovery and to be relieved of [her] attorney of record."[1] Ms. Spell seeks to modify the Status (Pretrial Scheduling) Order that was issued on September 24, 1997, and supplemented on October 1, 1997.[2] The parties stipulated to modify the discovery

---

[1] An "unnoticed motion" typically remains unnoticed in the case file until the motion is brought to a judge's attention. Such motions do not have to be considered since they violate Local Rule 78-230. The fact that Ms. Spell filed such a motion and violated a local rule indicates the difficulty she may experience in trying to prosecute this lawsuit without counsel. Part of her motion nonetheless seeks to discharge her counsel. Since Ms. Spell's request to be relieved of counsel appears contingent upon her ability to both reopen discovery and modify other dates entered under Rule 16 of the Federal Rules of Civil Procedure, however, and since she has not demonstrated that the Rule 16 Order should be modified, her request to discharge her counsel is denied.

[2] Plaintiff's present counsel assumed her representation on May 19, 1998, and stipulated with opposing counsel to change

deadline in the Rule 16 Order filed September 24, 1997, by extending it to September 30, 1998. That stipulation was approved by Order filed August 3, 1998.

Rule 16 was drafted to assure the Court and the parties that "at some point both the parties and the pleadings will be fixed." Advis. Comm. Notes for 1983 Amend. Consistent with the Rule's intent, Rule 16 scheduling orders "control the subsequent course of the action unless modified by the court." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Such orders "may be modified upon a showing of 'good cause.' " *Id.*

> Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end.

Id. at 609 (citations omitted).

Ms. Spell fails to demonstrate good cause for her belated motion to amend. First, she points to her lawyer's purported failure to conduct discovery. Even assuming her lawyer did not diligently undertake discovery prior

---

certain dates in the September 24 Rule 16 Order which was ordered on August 3, 1998.

to the Rule 16 deadline, however, Ms. Spell fails to show why her lawyer's lack of diligence constitutes good cause. "[A]s a general rule an attorney's blunder binds [his] client." *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998); *In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985) (where the court reveals that sometimes the faults of attorneys and their consequences are visited upon clients).

Second, Ms. Spell indicates she may seek an amendment of her claims. Given the delay of her proposed addition of claims to this action, however, and the fact that the delay appears to have been within her control, Ms. Spell has not demonstrated that good cause justifies allowing her to amend her claims.

Third, Ms. Spell states she "is tentatively scheduled for neurosurgery during the month of October regarding an occupational injury." She does not explain, however, why her surgery was scheduled for October; nor does she explain what she means by "tentatively scheduled." Nor does she show how her surgery might interfere with her lawyer's representation of her, or her representation of herself, should she subsequently decide to proceed without counsel. For instance, she does not state whether the six-week post-operative recovery would place her outside of communication with her lawyer; nor does she reveal whether the post-operative recovery would affect her ability to think about her case or access documents.[3] This

---

[3] Nor has she provided proof supporting the occupational injury, tentative surgery, and the physician's prognosis.

showing does not constitute good cause justifying amendment of the Rule 16 Order.

She concludes her motion by asking that "discovery be reopened and extended eight months," that law and motion then follow the reopened discovery period, and that she be afforded time to obtain new counsel, to amend her complaint with new facts, and to explore whether she should add other plaintiffs to her action. Ms. Spell simply fails to demonstrate good cause to justify modifying the Rule 16 Order as she requests. "[L]itigants have an unflagging duty to comply with clearly communicated case-management orders, and this duty extends even to litigants who proceed pro se." *Rosario-Diaz*, 140 F.3d at 315.

For the stated reasons, the motion is denied.

IT IS SO ORDERED.

Dated: October 28, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	CIV. S-96-1472 GEB **ORDER** (Filed Oct. 6, 1998)

The law firm of John L. Burris seeks to withdraw as attorney of record for Plaintiff Angela R. Spell and to substitute Ms. Spell as plaintiff *in propria persona* pursuant to the "stipulation" and proposed order Plaintiff lodged October 2, 1998. The withdrawal request is denied without prejudice for the following reasons.

This request is troubling because a prior request indicated that Plaintiff's counsel failed to conduct all desired discovery. Thus, it is unclear whether Ms. Spell assumes that granting the request will entitle her to reopen discovery and modify other Rule 16 deadlines. Prior to submitting the October 2 request, Plaintiff's counsel unsuccessfully tried to change the discovery cut-off date through a stipulation which stated at that time:

> Plaintiff's counsel has indicated that he will withdraw from this case and the plaintiff, Angela Spell, has apparently agreed. In response to plaintiff's Counsel's request that

> additional time be allowed for discovery and, in recognition that additional time will be needed for the hearing date on the dispositive motions and the pretrial conference if the discovery deadlines are moved, the parties hereby stipulate to the following discovery cutoff dates. . . .

Stipulation and [Proposed] Order at 1. Although it appears that granting the motion now would force Plaintiff to assume self-representation at a critical stage of the proceeding, after the discovery cut-off date has passed and as the last hearing date for law and motion matters looms, the request fails to address Ms. Spell's awareness of this plight. It is thus unclear whether she would favor the withdrawal request if she fully understood the litigation predicament she will face without counsel if it is granted.

Since the request neither addresses Ms. Spell's awareness of her predicament without counsel nor provides reasons sufficient to justify the withdrawal at this late stage of the proceeding, it is denied without prejudice.

IT IS SO ORDERED.

DATED: October 5, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	CV S-96-1472 GEB/PAN **ORDER** (Filed Sep. 30, 1998)

The parties' request to modify the September 24, 1997, Status (Pretrial Scheduling) Order is not justified by good cause and is therefore denied.

IT IS SO ORDERED.

DATED: September 28, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELA R. SPELL, Plaintiff-Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ERNEST L. LEWIS; DONAL A. WALSH; D. ROBERTO PAEZ; GEORGE A. KAYSEN, Defendants-Appellees.	No. 99-16216 DC# CV-96-01472-GEB Eastern California (Sacramento) ORDER (Filed Feb. 27, 2001)

Before: WALLACE, BEEZER and FERNANDEZ, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing.

Judge Fernandez has voted to deny the petition for rehearing en banc, and Judges Wallace and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied. No further filings shall be accepted in this closed appeal.

APPENDIX I

LAW OFFICES
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EMBARCADERO CENTER WEST
275 BATTERY STREET
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FAX (415) 956-8054

September 22, 1998

Honorable Garland E. Burrell
Judge of the United States District Court
Eastern District
650 Capitol Mall
Sacramento, CA 95814

Re: ***Spell v. The Regents of the University of California***
U.S. District Court, Eastern District
Case No. CIV-S-96 1472 GEB

Dear Judge Burrell:

Plaintiff's counsel, Miles Washington, has indicated that he will be withdrawing from this case, and the plaintiff will represent herself. For that reason, we enclose a stipulation to extend the deadlines for expert disclosures, completion of discovery, hearings on dispositive motions, and a continuation of the pretrial conference.

If the enclosed stipulation is acceptable, I would appreciate your signing the order and having your clerk

return an endorsed "filed" copy to me. I will serve the stipulation and order on plaintiff's counsel.

Very truly yours,

GORDON & REES, LLP

/s/ Michael D. Bruno
Michael D. Bruno

Enclosure

cc: Miles Washington

APPENDIX J

MICHAEL T. LUCEY (SBN 099927)
GRETA W. SCHNETZLER (SBN 121100)
MICHAEL D. BRUNO (SBN 166805)
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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ERNEST E. LEWIS DONAL A. WALSH, D. ROBERTO PAEZ, and GEORGE A. KAYSEN

UNITED STATES DISTRICT COURT –
EASTERN DISTRICT OF CALIFORNIA

ANGELA R. SPELL, Plaintiff, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants.	CASE NO. CIV-S-96 1472 GEB **STIPULATION AND [PROPOSED] ORDER**

Plaintiff's counsel has indicated that he will withdraw from this case and the plaintiff, Angela Spell, has apparently agreed. In response to plaintiff's counsel's request that additional time be allowed for discovery and, in recognition that additional time will be needed for the hearing date on the dispositive motions and the pretrial conference if the discovery deadlines are moved,

the parties hereby stipulate to the following discovery cutoff dates and request that this Court order the same:

Expert disclosures: October 15, 1998;
Completion of all discovery: November 16, 1998;
Dispositive motions hearing deadline: January 20, 1999;
Pretrial conference: February 1, 1999.

This Court has signed previous orders granting extensions of time which were necessitated by plaintiff, who was previously *pro se*, hiring attorneys.

IT IS SO STIPULATED.

DATED: September 18, 1998

GORDON & REES, LLP

By /s/ Michael D. Bruno
Michael D. Bruno
Attorneys for Defendants
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ERNEST E. LEWIS, DONAL A. WALSH, D. ROBERTO PAEZ, and GEORGE A. KAYSEN

DATED: September 19, 1998

LAW OFFICES OF JOHN BURRIS

By /s/ Miles Washington
Miles Washington
Attorney for Plaintiff

ORDER

Good cause appearing therefor, it is hereby ordered that expert disclosures will be due on October 15, 1998. The date by which all discovery is to be completed is November 16, 1998. Dispositive motions must be heard by January 20, 1999. The pretrial conference is continued to February 1, 1999.

DATED: _____, 1998

GARLAND E. BURRELL
Judge of the United States
District Court

APPENDIX K

"EXHIBIT A"

UNIVERSITY OF CALIFORNIA, DAVIS

[Address Omitted In Printing]

In Confidence

March 24, 1998

Joseph Silva, M.D., Dean
University of California
School of Medicine
Davis, CA 95616

Re: Angela Spell's Appeal of Dismissal

Dear Dr. Silva,

I am writing in support of Ms. Angela Spell's appeal of her dismissal from our school of Medicine, November, 1996. I support her appeal based on the fact that she was being held illegally on probation at the time she received a "Y" grade in Pediatrics. Even if she had received an "unsatisfactory" for her performance on the wards part of Pediatrics, a point that is now in dispute and one which I have no first hand information about, she should have been removed from probation by the time she took Pediatrics because she had already remediated a past deficiency nearly two quarters earlier. This is but one more example of how the application of our flawed operational policies regarding "extended probation beyond remediation" has been applied in an arbitrary way to abet disruption of our medical students education. In this specific case, had Ms. Spell not been given a "life sentence" on probation upon her re-instatement in March, 1996, she would not have been on probation during the Pediatric

clerkship and, consequently, not subject to dismissal without a hearing after receiving the "Y" grade. Simply stated, had Ms. Spell not been put in "double jeopardy" by having been given the illegal "life sentence", we would not need to be addressing her appeal today.

As you know from my past correspondence, I have argued since Fall, 1995 when I first became aware of this egregious problem, that our **"extended probation beyond remediation" for some, but not all of our students on probation was discriminatory, inappropriate, unjust and illegal.** In this specific case I believe that the decision to dismiss Ms. Spell was procedurally in error, and as a consequence, dismissal violated her rights and privileges under our **Faculty Regulations, Section 80 (A) (2).** According to this regulation Ms. Spell should not have been considered to be on academic probation during the Summer Quarter, 1996, since she had already remediated her earlier deficiency, and therefore not subject to dismissal. Thus, I allege that a procedural error was made by the School of Medicine when we did not follow our own rules in effect at the time Ms. Spell had been admitted, and that this action violated her rights and privileges as a medical student. **Accordingly, I recommend that as Dean you rescind the decision to dismiss and re-instate Ms. Spell so that she can seek a transfer without the stigma and bias of being a dismissed student.**

I should also like to respectfully note that while University Counsel has apparently indicated that the inclusion of the word **"may"** in our **Faculty Regulation 80 (A) (3)** gives the Promotion Board "discretionary authority" or "leeway" in whether an "individual should remain on probation," (Redacted Minutes of the FEC,

10/10/96), that this interpretation is not in the best interest of our school, its students or faculty, or in the spirit of Reg. 80 (A) (2). I submit that to adhere to this interpretation as a way to justify placing students on permanent probation is a policy that attempts to make an illegal act legal.

I would be pleased to discuss any aspect of this letter with you at your convenience.

Sincerely yours,

/s/ Frederic A. Troy II
Frederic A. Troy II
Professor

cc. A. Spell

APPENDIX L

"EXHIBIT B"

April 30, 1997

Appeals Committee
School of Medicine University of California, Davis
Davis, California 95616

To whom it may concern:

The purpose of this letter is to state my support of the appeal of Angela Spell for reinstatement to the School of Medicine. As you are aware Angela was dismissed from the school in 1995, readmitted in 1996, and subsequently dismissed a second time in 1996. The reason for her dismissal was that she was not passed on a Pediatrics clerkship while being on probation for prior academic difficulties. All prior academic difficulties had been remediated by the time of her beginning her clerkship in Pediatrics, however. This letter reflects both an appeal to reinstate Ms. Spell as a medical student at UC Davis Medical School as well as a request that the school consider changing its policy on long term probation of students with academic difficulty. That policy unfairly weighs against students who have remediated past problems.

When Angela Spell was readmitted to the School of Medicine in 1996 she began by completing a required course in nephrology, thus clearing her prior academic deficit. She performed well in this course and became eligible to enter her third year clerkships. She deferred taking her first clerkship in July 1996 because her son was visiting from Africa and she felt could not leave him unattended during his brief visit to the United States. At

the time of her reinstatement, Ms. Spell was eligible for and dependent on continuation of financial aid as she had been in years past. However that financial aid was held up. It became a critical issue for her as her financial concerns escalated and actively interfered with her performance on the Pediatrics ward. Only when the decision was made to dismiss her from school was the financial aid crisis resolved and part of her loan released to her. However, by this time the damage had been done.

My support for Ms. Spell's requested reinstatement is focused on two elements: First, that Angela Spell was not provided the financial aid that she deserved and merited, a distraction which denied her a fair chance to succeed at UC Davis. Second, a due process and procedural error may have occurred at the Department of Pediatrics evaluation of Ms. Spell's performance on the clerkship. It is my understanding that the evaluation committee at Pediatrics considered Ms. Spell's performance on the National Board Examination rather than focusing solely on her performance on the wards and in the outpatient settings. Disclosure of her written score was a breach of confidentiality. Without consideration of the National Board examination and upon review of written evaluations, it would appear that Ms. Spell had performed at a passing level at this clerkship, even though this performance took place while she was distracted on a nearly daily basis with efforts required to recover her financial aid.

Thus I believe Ms. Spell has not been given a fair opportunity to demonstrate her skills and to learn as a medical student in her third year at UC Davis Medical School. I believe she deserves reinstatement. However, I do not believe it is possible for her to have a positive

experience at the University of California, Davis. For this reason, I am recommending that she institute transfer to another institution upon her reinstatement. Only in that way can she have a clean slate to allow pursuing and completing her clinical training which I believe Ms. Spell deserves.

Sincerely,

/s/ E. J. Callahan
Edward J. Callahan, Ph. D.
Professor

EJC/gd

Supreme Court, U.S.
FILED
JUL 30 2001

No. 00-1953

IN THE

Supreme Court of the United States

ANGELA R. SPELL,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ERNEST L. LEWIS, DONAL A. WALSH, D. ROBERTO PAEZ and GEORGE A. KAYSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by petitioner is whether the district court and the Ninth Circuit Court of Appeals erred in holding that attorney error, as a matter of law, is insufficient *per se* as a ground for relief from summary judgment under Federal Rules of Civil Procedure 60(b)(1) and (6). In framing her question, petitioner claims that the Ninth Circuit "explicitly" bans attorney error as a basis for relief, "no matter how egregious." Petition, p. i.

In a sense, there is no "question presented" here, because neither the district court nor the Ninth Circuit made such a sweeping ruling. Rather, the Ninth Circuit, which is fully in line with the majority of other circuits in applying the analysis of *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S. Ct. 1489 (1993) to attorney-error cases, found no abuse of discretion in the lower court's denial of petitioner's motion for reconsideration, both because the alleged error of which she complains — a "failure" of one of her attorneys, who represented her for a few months during the years of litigation, to conduct additional discovery — was insufficient to merit relief and because the motion for reconsideration merely reiterated the losing legal arguments already rejected by the district court.

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STATEMENT OF THE CASE

This petition arises from an appeal from the denial of a motion for reconsideration of summary judgment under Federal Rule of Civil Procedure Rule 60(b)[1] and thus does not involve a review of the underlying judgment. *Brower v. Director*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 560 n.7 (1998). Nevertheless, to give this court a frame of reference within which to view petitioner's arguments, a brief synopsis of the underlying facts follows.

A. Spell Is Dismissed from the Medical School

Petitioner Angela R. Spell entered the School of Medicine of the University of California at Davis, California, in 1991 and was dismissed (for the second and final time) in November of 1996 after the board in charge of such decisions "carefully and deliberately considered [Spell's] entire record . . . and came to the conclusion that she had not demonstrated the personal and academic responsibility necessary to complete the medical school curriculum and to function as a safe and responsible physician." Appendix C-9. The order granting summary judgment to the respondent Regents, Appendix C to the Petition, sets forth the details of Spell's disastrous career as a medical student at C-3 through C-7, and concludes, citing the medical school dean's sworn declaration, that Spell

> . . . had failed three courses, despite numerous postponements of final examinations, had taken a leave of absence, was on academic probation

1. Henceforth, all references to "Rules" will be to the Federal Rules of Civil Procedure, unless stated otherwise.

> for the majority of her medical school career, and by the time she was dismissed the second time, had been "subject to dismissal twice before, dismissed once, and reinstated but still showed the same problems which plagued her earlier."

Appendix C-9.

B. Spell Actively Litigates in Several Forums Both with and without Counsel

The record on appeal demonstrates that Spell actively sought to avenge herself against the university in several forums. She appealed her dismissal through the medical school's system and, when that appeal was denied, decided that the appeals process itself had violated her due process and other rights. She then filed a complaint with the United States Department of Education, Office of Civil Rights, alleging that she had been dismissed in retaliation for "protected activities." In this litigation, Spell was represented by Peter Brixie, Esq., who may also have represented her as a party to the Health Professionals for Fairness and Progress discrimination class action.

On August 14, 1996, Spell filed this action against the Regents and four members of the faculty or administration of the School of Medicine at Davis. The complaint, later amended, set forth nine claims alleging nearly every type of gender, race and disability discrimination in the books plus a First Amendment claim. Appendix C-7 to C-20.

Spell commenced this action *pro se*, and then filed an ex parte request for appointment of counsel which was granted on February 18, 1997. She then turned down offers

of assistance from counsel available through the panel of court-appointed attorneys. As the litigation proceeded, Spell opposed motions brought by the Regents, winning some and losing some, responded to interrogatories and other discovery requests, and amended her complaint after the individually named defendants were dismissed.

After nearly two years of handling this matter *pro se*, Spell retained the Law Offices of John L. Burris, a well-known civil rights firm in Oakland, California. The Burris firm substituted in as counsel on May 30, 1998, and assigned the matter to Miles Washington, Esq. Washington defended Spell throughout her six-day deposition, and attended another deposition.

C. Even after Service of the Summary Judgment Motion, Spell Insists on Being Relieved of Representation against the Court's Advice

After three and one-half months, on August 30, 1998, the Burris firm notified Spell that it wanted to withdraw from her representation, *and Spell apparently agreed*, as shown by a stipulation filed with the court on or about September 22, 1998. Appendices I-1 and J-1. The Burris firm then moved to withdraw pursuant to that stipulation on October 2 – a motion which was denied on October 6, apparently out of the court's concern that Spell should not proceed without representation at that "critical stage of the proceeding." Appendix F-2.

On October 16, six weeks after Spell was first placed on notice that she should find replacement counsel, the Regents filed their motion for summary judgment. Despite the filing of this motion and despite the court's implied recommendation that she not proceed without counsel, Spell

did not retain replacement counsel, but instead went to the opposite extreme, and moved on October 23 to be relieved of her attorney. Appendix E.

Again the court turned down the request with comments about "the difficulty [Spell] may experience in trying to prosecute this lawsuit without counsel." Appendix E-1 n.1. And again Spell ignored the court's advice. She not only did not retain new counsel, she sent a lengthy letter to the court (which is part of the record on appeal) on November 16, practically beseeching it to allow her to fire her attorney, and asserting that she was receiving "a great amount of assistance" from various pro bono attorneys and unnamed others. The court relented and granted Spell's third demand to be relieved of counsel. Appendix D.

D. Spell Opposes the Motion for Summary Judgment *Pro Se*

The court also gave Spell an extension of three weeks until December 7 to file opposition to the pending motion, for a total extension of nearly five weeks from the initial due date. Appendix D. Again, Spell proceeded without retaining counsel.

As discovery had closed, Spell began making use of available mechanisms to reopen it. Her first motion to reopen discovery (and extend it for eight months) was denied on October 28, with the court explaining to Spell exactly what sort of showing she should have made to procure an extension: a showing of good cause, of due diligence before the close of discovery, and of specific reasons for seeking the extension. Appendix E.

Rather than refiling the motion following the roadmap the court provided for her, Spell waited until she filed her opposition to the summary judgment motion on December 7, and then asked for leave to depose four witnesses. Appendix C-1, n.1. The court denied the request for two reasons – an absence of any showing of good cause along the lines spelled out in the October 28 order, and a failure to provide an affidavit showing the particular facts she expected to develop during the requested discovery and how they would preclude summary adjudication, as required by Rule 56(f). Appendix C-I and C-2, n.1.

Even without additional discovery, Spell timely submitted a massive opposition to the motion – 225 pages in all, including her own declaration and 74 pages of testimonials, records and other documents. Summary judgment was granted to the Regents on all claims, several of which were adjudicated as matters of law and others for the absence of evidence sufficient to refute the showing made by the Regents. Appendix C-7 to C-20.

The opinion of the district court showed clear cognizance of the deference it was required to extend to academic decisions (especially those of medical school faculties), citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985), as follows:

> When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment [and] may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person

> or committee responsible did not actually exercise professional judgment.

The court then concluded that the evidence of Spell's unsatisfactory grades and dismissals were academic decisions that did not depart from accepted academic norms, and that her assertions of discriminatory intent were insufficient to avert summary judgment. Appendix C-10 to C-11.

Spell responded with a motion for reconsideration under Rule 59 (dismissed as untimely and not at issue here) and a motion under Rule 60(b), which consisted of a 65-page legal memorandum, a declaration with two attachments, and 49 other exhibits, for a total of approximately 300 pages.

The court properly denied the Rule 60(b) motion for lack of "newly discovered evidence" which could not have been discovered and produced for the summary judgment motion, noting that the majority of the exhibits submitted predated the date for submission of that motion. Certain of these exhibits were dated as early as September 1, 1989; two others are attached to the Petition as Appendices K and L and are dated April 30, 1997, and March 24, 1998, long before the summary judgment motion was submitted. The court also reminded Spell that, as a *pro se* litigant, she was required to follow the same rules of procedure that govern all other litigants, citing *King v. Ativeh*, 814 F.2d 565, 567 (9th Cir. 1987). Appendix B-3.

As a second basis for denying the motion, the court noted that it merely reiterated the losing arguments raised previously. Appendix B-4.

Her first appeal having been dismissed for failure to pay the filing fee, Spell filed a second notice, and her unsuccessful appeal and petitions for rehearing followed.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Is Not in Conflict in its Post-*Pioneer* Rulings on Relief from Attorney Error

The premise upon which Spell bases her petition is false. Spell argues repeatedly that review is needed here because, in its unpublished memorandum opinion, the Ninth Circuit affirmed the denial of her motion for reconsideration

> . . . by invoking a rule of law – that attorney error can ***never*** be the basis for relief under Rule 60(b) from a judgment – that is contrary to this Court's ruling in *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380, 113 S. Ct. 1489 (1993). While a majority of the circuit courts have followed *Pioneer* by holding that attorney error ***can*** be a basis for relief, the Ninth Circuit . . . fails to follow *Pioneer* by establishing a *per se* rule that attorney error can never qualify.

Petition, p. 13, bold-face italic emphasis in original. Spell even goes so far as to claim that, in ruling on her motion, the Ninth Circuit banned all relief from attorney error, "no matter how egregious." Petition, p. i. The Ninth Circuit has invoked no such rule, and there is no conflict to merit review.

The case upon which this analysis turns is *Pioneer*, in which this Court examined the circumstances under which an attorney's error in missing a filing deadline may operate

as "excusable neglect" sufficient for discretionary relief under Bankruptcy Rule 9006(b). The Court looked at several other statutory uses of the term "excusable neglect," and found that, "Although inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable neglect,' " the concept is an "elastic" one, sometimes linked to events beyond the movant's control (as with Rule 60(b)), and sometimes not (as with Rule 6(b)). *Pioneer*, 507 U.S. at 392, 394, 113 S. Ct. at 1496, 1498-99.

Then, noting that "Congress has provided no other guideposts," this Court concluded that

> . . . the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice [to the other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id., 507 U.S. at 395, 113 S. Ct. at 1498. This Court then held that "an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute 'excusable neglect' within the meaning of the [bankruptcy] Rule." *Id.*, 507 U.S. at 383, 113 S. Ct. at 1492.

In the single sentence of the unpublished memorandum opinion which disposes of this matter on two separate grounds, the Ninth Circuit made no mention of *Pioneer*'s liberality to attorneys who miss deadlines – after all, this is not a deadline case. In fact, the court said no more on the

subject of attorney error than: "The district court did not abuse its discretion in denying Spell's motion for reconsideration because 'attorney error is insufficient grounds for relief under both Rule 60(b)1 and (6),' " and directed the reader to see two cases on attorney error. The court then went on to its second reason for the affirmance, namely, ". . . Spell's Rule 60(b) motion merely reiterated the arguments that she had previously presented. . . ." Appendix A-2. The memorandum opinion does *not* say attorney error is *never* grounds for relief, and the two cases to which it directs the reader make clear that attorney error quite often *can* be grounds for relief.

The first case cited by the court is *Allmerica Financial Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664 (9th Cir. 1998), in which Llewellyn argued that his attorney's failure to plead the affirmative defense of waiver provided a basis for relief under Rule 60(b)(1). The court disagreed – but *not* because attorney error is *never* sufficient for relief. To the contrary, the court conceded freely that Rule 60(b)(1) "gives the district court power to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 665, citing *Ackermann v. United States*, 340 U.S. 193, 199-201, 71 S. Ct. 209, 212-13 (1950). However, the court noted that such relief "requires a showing of 'extraordinary circumstances' " and concluded that the failure of counsel to assert an affirmative defense does not constitute a circumstance justifying the extraordinary relief. *Ibid.*

The second opinion cited by the Ninth Circuit is *Engleson v. Burlington Northern Railroad Co.*, 972 F.2d 1038 (9th Cir. 1992), in which appellants argued unsuccessfully that their attorney's error in pleading the incorrect jurisdictional statute justified Rule 60(b) relief.

Again, no sweeping rule is set forth here that attorney error is never a basis for relief, as Spell would have this Court believe. Instead, the Ninth Circuit stressed that "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." *Id.* at 1044.

The *Engleson* court noted further that, to qualify for such relief, the movant must demonstrate mistake, inadvertence, surprise or *excusable* neglect, and that "[n]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief . . ." (*id.* at 1043), precisely foreshadowing *Pioneer*'s express statement that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect. . . ." *Pioneer*, 507 U.S. at 392, 113 S. Ct. at 1496. The *Engleson* court then concluded that, "in the instant matter, counsel's ignorance of the statute that governs labor law disputes between a railway worker and his or her employer does not constitute excusable neglect." *Id.* at 1044. Such an error is one of law which, as a general rule, does not constitute "excusable neglect," even post-*Pioneer*. *See, e.g., Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931-32 (9th Cir. 1994) (court contrasted "dramatic ambiguity" leading to error in *Pioneer* with the misconstruction of unambiguous rules before it, and found error of law not excusable).

Neither of these two opinions asserts a blanket prohibition against attorney error as a ground for relief under Rule 60(b) – and neither does the opinion at issue. Both opinions admit that attorney error may be a basis for relief, then find that the specific error at bar was not of the type which qualified. The Ninth Circuit has reached such fact-specific holdings in other cases, as well.

In *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995), the Ninth Circuit not only granted relief by applying *Pioneer*'s liberalized reading of "excusable neglect" to an attorney's missing of the deadline for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5), but did so even before this Court made *Pioneer* applicable beyond the bankruptcy context in *Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600 (1996). The following year, in *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 825, n.4 (9th Cir. 1996), the Ninth Circuit held that *Pioneer*'s analysis of "excusable neglect" is also applicable to Rule 6(b).

In *Briones v. Riviera Hotel & Casino*, 116 F.3d 379 (9th Cir. 1997), the *pro se* litigant sought relief for "excusable neglect" occasioned by the district court's failure to warn him of the possibility of dismissal (just as Spell blamed the district court, in her appellant's opening brief, for not telling her to submit admissible evidence in opposition to the summary judgment motion). In *Briones*, the first opinion in the Ninth Circuit to apply the equitable test of *Pioneer* to Rule 60(b), the court specifically stated that no *per se* rule denying relief for a failure to comply with court rules can exist after *Pioneer*, and remanded for further proceedings. *Id.* at 382. Nevertheless, the court made clear that neither *Pioneer* nor the Ninth Circuit was invoking automatic relief for every cry of error:

> [In *Pioneer*] the Court noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not *usually* constitute 'excusable neglect.' " 507 U.S. at 392, 113 S.Ct. at 1496 (emphasis added). Thus, although a late filing will

> ordinarily not be excused by negligence, that possibility is by no means foreclosed.

Ibid., emphasis in original. Utilizing the *Pioneer* approach as discussed in *Briones*, the Ninth Circuit granted relief on an equitable basis in *Bateman v. United States Postal Service*, 231 F.3d 1220 (9th Cir. 2000), where it found the attorney error resulted from negligence, "not from deviousness or willfulness." *Id.* at 1224.

Spell's argument that the Ninth Circuit is in conflict with other circuits in that it disobeys *Pioneer* and imposes a *per se* prohibition on attorney error as a basis for Rule 60(b) relief is just plain wrong. The circuit is fully in line with the majority of circuits, which find neither a blanket prohibition nor a blanket grant of relief, but have adopted *Pioneer*'s equitable analysis and reaffirm the district courts' limited discretion to grant relief "upon such terms as are just." *See, e.g., Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354 (7th Cir. 1997), in which the court stated it was *joining the Ninth Circuit* and seven others in acknowledging that "excusable neglect has a new and broader meaning" in the aftermath of the *Pioneer* decision, but noting at the same time that discretion is not limitless and that "[w]e do *not* hold that *all* late filings by counsel must henceforth be automatically considered 'excusable neglect' for purposes of Rule 60(b)(1)." *Id.* at 361, 362; emphasis in original. There is no conflict here, and no justification for seeking review.

B. Even if a Conflict Existed, this Case Is Not the Appropriate Vehicle for Reviewing or Resolving the Issue

Even if this court were to perceive a discrepancy between the holdings of various circuits with regard to attorney error as a basis for Rule 60(b) relief, *this case is not the appropriate vehicle for reviewing or resolving the issue* for several reasons.

1. This Is Not a "Missed-Deadline" Case

The *Pioneer* holding was extended in *Stutson*, *supra*, in which this Court applied the *Pioneer* view of excusable neglect to a missed deadline for filing an appeal under Federal Rule of Appellate Procedure 4(b). In other words, while the liberal *Pioneer* analysis was no longer limited to the bankruptcy arena, it was still tightly focused on pleas for relief from missed filing deadlines, and was not broadened to cover all instances in which a client is displeased by an attorney's actions.

The five cases cited by Spell at page 14 of the Petition to show the alleged majority view that "attorney error means relief from judgment" are all missed-deadline cases,[2] and the two post-

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2. *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997) (failure to inform court within 60 days that settlement had unraveled); *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248 (2d Cir. 1997) (failure to file papers pursuant to terms of local order); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988) (default taken after failure to timely answer complaint); *Castro v. Bd. of Ed. of the City of Chicago*, 214 F.3d 932 (7th Cir. 2000) (failure to file scheduled pretrial order); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (failure to timely demand trial de novo after arbitration).

Pioneer cases cited by Spell at pages 16 and 17 to show the allegedly errant behavior of the Fifth and Tenth Circuits in denying relief are also deadline cases.[3] *This matter is not a deadline case*. If Spell wants this Court to resolve a "conflict" in the treatment of missed deadlines, she must look elsewhere for the test case.

2. This May Not Even Be an "Attorney-Error" Case

Despite Spell's angry casting of blame at Miles Washington, Esq., who represented her for a few months during this litigation of nearly three years, this very well may not be an attorney-error case at all.

It has never been shown that anything Washington did or did not do caused the loss of the summary judgment motion, much of which was decided as a matter of law, or of the motions for reconsideration. Spell agreed to his withdrawal from the case at least as early as September 18 or 19, 1998 (Appendix J-1, J-2), and even after service of the summary judgment motion on October 16 and repeated admonitions of the court on October 6 and 28 that she should not be unrepresented, she did not retain replacement counsel. Instead, Spell filed the motions by herself (or perhaps with the assistance of her attorney in the related litigation or one or more of the pro bono attorneys she described to the court as helping her in her letter of November 16). She cannot now blame Washington if her writing style and legal analysis were unpersuasive, or if some of her exhibits were not in admissible format. After all, once the court "relieved" her of Washington as her counsel on November 17 after her third request, he could not have filed papers for her, even if he wanted to.

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3. *Servants of the Paraclete v. Does*, 204 F.3d 1005 (10th Cir. 2000) (failure to timely file notice of appeal); *Bohlin v. Banning Co.*, 6 F.3d 350 (5th Cir. 1993) (failure to timely oppose motion).

At page 9 of her Petition, Spell claims that the district court's ruling denying her motion for reconsideration stated that the "properly authenticated evidence belatedly presented . . . could have been presented in the original opposition to summary judgment," and then argues that it was Washington's error "that caused the failure of presentation in the first place." *This premise is false*. The ruling on the reconsideration motion appears in full at Appendix B, and contains not a single word criticizing Spell's evidence in opposition to the summary judgment motion either as unauthenticated or as inadequate. Instead, the ruling comments only on the evidence submitted on the Rule 60(b) motion – and rejects it as not "newly discovered" as required by that rule. Appendix B-3. The decisions not to submit the documents in opposition to the summary judgment motion and then to attempt to pass them off as "newly discovered" on the Rule 60(b) motion were solely those of Spell.

Spell's chief complaint against Washington is that he did not conduct more discovery, yet there is no reason to hold him responsible for any alleged gaps in discovery. Spell, who chose to proceed *pro se* for more than two years, or throughout most of this litigation, could have sent out document requests or conducted other discovery herself, just as she repeatedly responded to the Regents' discovery requests herself. (After her own six-day deposition, Spell certainly knew how depositions are conducted!) Or Spell could have retained counsel to conduct the discovery for her at any time – especially after August 30 when Washington told her he wanted to withdraw. She did not do so.

Finally, there is no reason to believe that contrary evidence existed which could have defeated the motion, but for Washington's failure to "discover" it. The Regents

provided Spell's entire academic record to the court; that record spoke for itself as the basis for the medical school's decision to dismiss her as one who was unlikely "to complete the medical school curriculum and to function as a safe and responsible physician." Appendix C-9. Depositions of her friends and supporters would not have changed the basic information upon which the medical school made its decision, which was the evidence the district court was *required* to examine to determine whether the deference normally accorded to university administrators – especially medical school administrators – should have been applied here. *See, e.g.*, the reference to the "narrow avenue for judicial review" of academic decisions in *Ewing*, 474 U.S. at 227, 106 S. Ct. at 514.

If this Court wants to review the issue of when attorney error is excusable, it should wait for a case in which a wrongful error actually occurred, was indisputably that of the attorney blamed, and had a prejudicial effect on the case – such as the missed-deadline cases referenced above. This case does not present any such issue.

3. The Decision Must Be Affirmed on the Alternate Basis, in Any Event

Either reviewing this case to scrutinize the district court's handling of a claim of alleged attorney error or, as petitioner asks in the alternative, summarily vacating and remanding would be a pointless exercise, as the standard of review requires an affirmance, in any event. As set forth above, the denial of the motion for reconsideration was affirmed for two reasons, the second of which was that the motion "merely reiterated the arguments that [Spell] had previously presented to the district court." Appendix A-2.

The decision then cited *Maraziti v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995), which is relevant here on two points. First, a denial of a Rule 60(b) motion for relief from judgment is reviewed under an abuse of discretion standard. *Id.* at 253; *see also Brower*, 434 U.S. at 263 n.7, 98 S. Ct. at 560 n.7. Secondly, such motions are properly denied when the movant "merely reiterated the arguments . . . already presented to the district court." *Maraziti*, 52 F.3d at 255; *see also Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. den.*, 506 U.S. 828, 113 S. Ct. 89 (1992).

"Mere reiteration" and nothing more is exactly what the district court found in Spell's motion for reconsideration, stating,

> The arguments [Spell] offers in support of her position are essentially restatements of prior arguments. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of" or as an attempt to relitigate "a point of disagreement between the Court and the litigant." *Wave* v. *First Citizen's Nat'l Bank*, 846 F.Supp. 310, 314 n.3 (M.D. Pa.) *aff'd*, 31 F.3d 1175 (3d Cir. 1994).

Appendix B-4.

In addition, the district court found that Spell had not submitted "newly discovered evidence" in support of her motion as required by Rule 60(b), specifically noting that the majority of the affidavits and other documents submitted as "new" predated the December 7, 1998, due date for the earlier summary judgment motion. Appendix B-3; *see* two of these exhibits, dated April 30, 1997, and March 24, 1998, at Appendices K and L.

Spell, who admitted at page 21 of her appellant's opening brief that she decided to withhold the exhibits at issue for "another filing" rather than submit them in opposition to the summary judgment motion, cannot blame anyone else for this decision and, as the district court pointed out, "*pro se* litigants must follow the same rules of procedure that govern other litigants." Appendix B-3, citing *King*, 814 F.2d at 567.

With neither new arguments nor new evidence before it, the district court did not abuse its discretion in denying the motion for reconsideration. *Maraziti, supra*. Because a decision which is correct on any ground may be affirmed (*Giebel v. Sylvester*, 244 F.3d 1182, 1186 (9th Cir. 2001)), the Ninth Circuit was correct in affirming this decision. For that same reason, either accepting this matter for full briefing and review or vacating and remanding for further proceedings would be a pointless waste of this Court's time and resources.

CONCLUSION

Petitioner misstates the unpublished opinion of the Ninth Circuit, claiming that it has invoked a general rule denying any and all relief from attorney error under Rule 60(b), "no matter how egregious," and then argues that this new "rule" places the Ninth Circuit in conflict with the majority of other circuits, which follow the liberal approach for missed-deadline cases established by this Court in *Pioneer*. There is no such "rule" in the Ninth Circuit, and its holdings on attorney error are not in conflict with *Pioneer* or with the majority view. Even if such a conflict had arisen, however, this case would not be the appropriate vehicle for review, as it is neither a missed-deadline case nor a clear attorney-error case at all, and as the standard of review required affirmance on a separate basis, in any event.

Respectfully submitted,

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